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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

S. HAMILTON GRAVES,
Counsel for First National Bank of Baltimore, Petitioner.

(19,683.)

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TO THE HONORABLE, THE CHIEF JUSTICE AND AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE.

The facts of this case were agreed upon (R. pp. 8-12 inc.) and the Honorable Judge Morris, who wrote the majority opinion (R., p. 26) of the Circuit Court of Appeals, gives this summary:

"Chester R. Baird, trading as C. R. Baird & Co.,

on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit: shares amounting to $500,000.00 of the capital stock of the said Roanoke Furnace Company.

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December,1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5, 1900, when a proper deed was executed and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000.00 against Baird as a non-resident of Virginia, were issued at the instance of certain of his creditors (one of which was the First National Bank of Baltimore, Maryland), and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon (Code of Virginia, 1887, Sections 2463, 2464, 2465, 2472). Within four months of the levying of the attachments, to-wit: on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of

the bankrupt estate of C. R. Baird and on June 29, 1901, John N. M. Shimer was appointed trustee of the estate of the Roanoke Furnace Company.

"Under orders of Court the property which was theretofore conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the Court below by express consent of all the parties."

The agreed facts further show (R., p. 11).

"That the proceeds from the sale when made by the officers of the Court, of the property conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company, were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs.

"That a sufficient part of the proceeds of sale from said property to pay off the amount due the First National Bank of Baltimore is now in the hands of said trustees under the last decrees aforesaid.

"That the balance due said Bank, exclusive of the costs incurred in the Hustings Court, is $8,152.06 with interest thereon at 6 per cent. from the 11th day of November, 1902."

This was also agreed (R., p. 10): "That the deed of November 5, 1900, from said Baird to the Roanoke Furnace Co., was a valid conveyance to a purchaser in good faith for a fair consideration, and was not affected by the Bankruptcy proceedings hereinbefore mentioned.

"That subsequent to the sale of the attached property, and the signing of the agreed statement of facts, a petition was filed in the "In re Roanoke Furnace

Company, Bankruptcy proceedings," in the District Court of the United States for the Western District of Virginia by William H. Staake, Trustee for C. R. Baird, wherein it was asked *inter alia,* that the lien acquired by your petitioner upon the property known as the "West End Furnace property" (which was the property conveyed by deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company), be declared void as to him, and that it be preserved by the Court for his benefit as trustee of C. R. Baird (R., p. 6); to this petition (R., pp. 13-15) a demurrer and answer was filed by the First National Bank of Baltimore."

Upon the hearing of the issues made by said petition, and the demurrer and answer thereto, the District Court overruled the demurrer and in effect decided and held that the attachment lien having been obtained through legal proceedings to which Baird was a party, he being insolvent, and within four months prior to the filing of the petition in Bankruptcy against him, was null and void under Sec. 67f of the Bankruptcy Act of 1898, and though the property attached was not the property of C. R. Baird when the bankrupt petition was filed, that power was given to the Court by said section to enforce liens for the benefit of all the creditors, even though said liens might not be annulled under said Sec. 67f (R., p. 19); that if one creditor was paid in full while other creditors received only a portion of their claims, a preference would be created, though the payment to the creditor who was paid in full was from a source other than the bankrupt's estate; that Sec. 67f is not confined to liens that create a preference, that if the attachment was held to be valid *quoad,* Staake, Trustee, it would give a preference to your petitioner; the Court then declared the lien void as to said trustee and ordered that it be preserved for the benefit of Baird's estate, and on January 14, 1904 (R., p. 21), ordered as follows:

> "That the rights acquired by the attachment proceedings in the Hustings Court of the City of Roanoke by the attaching creditor, to wit, the First

National Bank of Baltimore, Maryland, be preserved for the benefit of the estate of the said C. R. Baird, bankrupt, and that said petitioner, William H. Staake, trustee of the said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce the attachment lien with like force and effect as the said attaching creditor might have done had not the bankruptcy proceedings intervened."

On January 22, 1904, your petitioner filed in the United States Circuit Court for the Fourth Circuit, its petition, wherein it prayed the jurisdiction of said Court under the provisions of Sec. 24b of said Bankruptcy Act, and that said Court superintend and revise in matter of law the proceedings and findings of the District Court, and that said Court revise, reverse and annul that portion of the decree of January 14, 1904, as is last above set forth (R., 1-4).

That in said Circuit Court of Appeals said case was docketed as follows:

"First National Bank of Baltimore, Petitioner, vs. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, et el., Respondents," and was entered as No. 532.

That said case was on May 12 and 13, 1904, argued and submitted in said Court; that on November 15, 1904, the said Circuit Court of Appeals rendered an opinion per Morris, District Judge, concurred in by Goff, Circuit Judge (R., p. 31) and entered an order affirming the judgment of the District Court in the matter brought up for review; that District Judge Purnell, the other member of the Court sitting in the case, filed a dissenting opinion (R., p. 30). Your Petitioner on December 9, 1904, (R., pp. 31-38), filed a petition in said Circuit Court of Appeals wherein it prayed that a rehearing be granted to it upon the original record therein and upon the majority opinion rendered November 15, 1904, that the decree entered on that date be an-

nulled, and that in lieu thereof a decree be entered in conformity with the prayer of the original petition. The prayer of the petition to rehear was denied by said Court by an order entered February 7, 1904 (R., p. 39).

The case is before this Court on a writ of *certiorari*.

ABSTRACT OF PERTINENT FACTS.

In December, 1899, C. R. Baird was the owner of various parcels of real estate located in Roanoke, Virginia, one parcel of which was designated as the "West End Furnace Property."

That on December 7, 1899, (R., p. 10, §8), he sold said last named property to the Roanoke Furnace Company, a corporation.

That he received (R., p. 12, §10) the entire purchase price to which he was entitled.

That the Roanoke Furnace Company (R., p. 10, § 8) failed to immediately record, as required by the Registry Laws of Virginia, the written evidence of its purchase.

That on October 26, 1900 (R., p. 8, §1), petitioner attached said "West End Furnace Property" for a debt due to it by C. R. Baird.

That on November 7, 1900, (R., p. 10, §8), the Roanoke Furrace Company recorded a deed from C. R. Baird, which conveyed said property to it in fee.

That on December 24, 1900 (R., p. 9, §2), a petition in bankruptcy was filed against C. R. Baird.

That William H. Staake was subsequently appointed the trustee for Baird's estate.

That on December 29, 1900 (R., p. 9, §5), a petition in bankruptcy was filed against the Roanoke Furnace Company.

That in the, In. Re. Roanoke Furnace Company bankruptcy proceedings, Staake, the trustee of Baird, filed a petition and prayed to be subrogated to the rights of the Bank in its attachment against the "West End Furnace Property."

It will not be contended that the "West End Furnace Property" could or should pass to Baird's trustee.

It will not be denied that all title, interest, and equity in said property did pass to the trustee of the Roanoke Furnace Company, subject to the attachment lien.

LEGAL QUESTIONS INVOLVED.

1. Should the trustee of a bankrupt be subrogated to the rights of an attaching creditor, in an attachment which was procured within four months of the filing of the bankruptcy petition, upon property in which the bankrupt had no beneficial interest, and became a lien, only by reason of the failure of the owner of the beneficial interest to comply with the registry statues of Virginia, and the legal title which was in said bankrupt having been conveyed by him by a valid conveyance subsequent to the attachment, but forty-nine days prior to the filing of the petition against him?

2. Can a creditor of a bankrupt solely by reason of his being such creditor, obtain a prohibited lien against property which would not pass to the trustee in bankruptcy, if unaffected by the lien?

3. Does a creditor of a bankrupt secure a ***preference*** by receiving his debt in full, when other creditors of the bankrupt receive only a percentage on their debts, when the creditor receiving the payment in full ***does not receive*** such payment out of the bankrupt's estate, and when such payment works no diminution of that estate?

II

SPECIFICATION OF ERRORS RELIED UPON.

(1) That the District Court erred when it decreed (R., p. 21.), that the lien acquired by Petitioner in the Attachment Proceedings in the Hustings Court of the City of Roanoke was void as to it, but, should be preserved for the benefit of said Staake, Trustee, and in

directing that he be subrogated to the rights of Petitioner under said attachment.

(2) That the Circuit Court of Appeals erred (R., p. 31) when it affirmed said Decree of the District Court.

The propositions of law decided and established by the majority opinion of the Circuit Court of Appeals, and by its affirming the opinion of the District Court, which it is submitted are erroneous, are these:

(1) That by virtue of Sec. 67f of the Bankruptcy Act of 1898, an attachment which was levied by a creditor of a Bankrupt and became a valid lien under the laws of the Commonwealth of Virginia upon certain real estate, which could not pass to the Bankrupt's trustee, the ownership of and title to said real estate, both legal and equitable, being in a third party at the time the petition in bankruptcy was filed, is void *quoad* the bankrupt debtor's trustee; though said lien is admitted to be valid *quoad* the owner of the property attached.

The attached real estate having been sold to such third party by the bankrupt twelve months prior to the filing of the petition in bankruptcy, for a fair consideration, the entire purchase price paid without diminution because of said attachment, and a deed admittedly valid, executed, delivered and recorded forty-nine days prior to the filing of the petition in bankruptcy.

(2) That the trustee of a bankrupt, under and by virtue of Sec. 67f, should be subrogated to the rights of an attaching creditor in an attachment, *which is a lien upon the property of a third party;* property in which the bankrupt had neither ownership or title, either legal or equitable, property which the bankrupt could not have transferred, and which could not have been levied upon under judicial process against him within forty-nine days next prior to the filing of the petition in bankruptcy. In other words, that under said section, the trustee of a bankrupt is made the beneficial owner of a lien, which is upon property which

could not pass to him as such trustee under Sec. 70 of the Bankruptcy Act. That such ownership is vested in him by virtue of the fact that the lien was procured by a *creditor* of the bankrupt, and *not* because the lien has any affect whatsoever upon *the estate* of the bankrupt.

(3) That under and by virtue of Sec.67f, a trustee of a bankrupt should be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected discharged therefrom under Sec. 67f. In other words, that the trustee should be subrogated to the rights of a creditor in an attachment, the lien of which is valid.

(4) That a preference within the meaning of the act is secured, if one creditor receives the full amount of his debt and another does not, even though the creditor who receives payment in full receives nothing from the estate of the bankrupt, but is paid entirely out of property which did not belong to the bankrupt, and which could not be subjected by or pass to his trustee. In other words, that unless each creditor receives equal percentage of payment, regardless of the source from which payment is secured, there is preference.

ARGUMENT:

The primary question of this case, (as I construe Thompson vs. Fairbank, 196 U.S., 516) is, what was the status under the laws of Virginia of the property upon which the attachment was levied?

In December, 1899, C. R. Baird was its sole owner.

On December 7th, 1899, he (Baird) sold it to the Roanoke Furnace Company and received the entire consideration to which he was entitled (R. p. 10, §§ 8 & 9). Thereupon a trust was created, the Roanoke Furnace Company being the real beneficial owner, and Baird a mere trustee of the naked legal title for its benefit. Subsequent to that time whatever advantage

may have accrued to the property was the purchaser's gain. What loss may have fallen on the estate is the loss of the purchaser.

The illustration of the general doctrine as given by Mr. Pomeroy (Pomeroy's Eq. Jur., 2d Ed., Vol. 2, p. 1435, Sec. 981) is in these words:

> "Whenever an owner agreed for a valuable consideration to sell his estate, although there was no conveyance, and there were no words of inheritance in the contract, equity declared that a use was created in favor of the vendee, by means of the consideration, and that the vendor held the legal title as his trustee."

In Virginia the consideration is the essential fact which determines the real beneficial ownership.

> "When one holds the legal title and another is beneficially entitled in whole or in part, an implied or constructive trust arises in favor of the latter to the extent of his interest."

Smith's Exer. vs. Proffitt's Admr. 82 Va., 851.
Borst vs. Nalle et al., 28 Grat. (Va.), 435.
Floyd vs. Harding, Idem 406.

On October 26, 1900, the attachment lien was acquired by petitioner. It was conceded that the attachments levied became valid liens upon the beneficial interest of the Roanoke Furnace Company, because of its failure to record the evidence of its purchase, as required by the registry statues of Virginia. (See Supra, Statement of Morris, J.)

On November 5th, 1900, Baird by deed admittedly valid (R. p. 10, Article 8), conveyed the legal title to the Roanoke Furnace Company, which said deed was at once recorded as required by the Registry statues of Virginia and thereupon every vestige of interest, legal or equitable, passed from Baird and subsequent to that time, under the laws of Virginia, neither he, or any one claiming under him, or any creditor of his, either had or could acquire any interest therein, or lien

thereon, because of his previous ownership.

On December 24th, 1900, the petition in bankruptcy was filed against Baird, and as of that date, under the laws of Virginia, neither he nor any general creditor of his had any interest in or right to proceed against the attached property, and had not had for forty-nine days prior thereto.

It is submitted that under the laws of Virginia Baird had no beneficial interest in the property attached when the lien was acquired, and had neither interest or title when the bankruptcy petition was filed against him.

The words "the property of the bankrupt" as used in the Act and the decisions, mean only the property to which the bankrupt *is beneficially entitled*, and does not include property to which he has the bare legal title.

Hewit vs. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986.

Low vs. Welch, 139 Mass. 33, 29 N.E. 216.

Mr. Justice Holmes, when delivering the opinion in the case last cited, used this language:

> "The defendant concedes that, if the words, 'property of the debtor' stood alone, they would not extend to property in which he had no beneficial interest, but merely a bare legal title. This concession is just, and is required by the cases. It cannot be supposed, in the absence of any particular equity or special and overriding policy, that a bankrupt or insolvent law intends to throw all property to which the debtor may have a naked title into the hands of his creditors. Such has not been the course of legislation or decision."

Bankrupt and Insolvent Laws are intended to secure the application of the effects of the debtor to the payment of his debts, (omitting question of discharge), and do not affect property held in trust:

2 Kent's Commentaries, p. 389-400.

Kip vs. Bank of New York, 10 Johns. Rep. 63.
Dexter vs. Stewart, 7 Johns. Ch. Rep. 52.
Yates & M'Intyre vs. Curtis, 5 Mason's Rep. 89.

The object of Bankruptcy Acts, the fundamental principle upon which they are founded so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert same into money and distribute it among the general creditors without preference. For that purpose, and that alone, the Bankruptcy Act declares void certain liens acquired within a specified time upon the property of the bankrupt.

Mayer vs. Hellman, 91 U.S. 503, 23 L. ed. 377.
Yeatman vs. New Orleans Savings Inst., 95 U.S. 764, 24 L. ed., 589.
Stewart vs. Platt, 101 U.S., 731, 25 L. ed. 816.
Connor vs. Long, 104 U.S., 244, 26 L. ed., 725.

The Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the property of the bankrupt which passes, or should pass to his trustee, and rights become vested as of the date the petition is filed.

In the case of Hewitt vs. Berlin Machine Works (194 U. S. 302, 48 Law Ed., 988), the Court adopted and approved the language of the C. C. A. of the Second Circuit, and said:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors *at the time when the trustee's title accrues.* The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed."

In the case of Pierie vs. Chicago Title and Trust

Co. (182 U.S. 449, 45 Law Ed., 1178), the Court used this language:

> "It is hardly necessary to assert that the object of a Bankruptcy Act, so far as creditors are concerned, is to secure equality of distribution among them of *the property of the Bankrupt.*"

Mr. Justice Catron, in the case re. Klein, which is cited and approved in Hanover National Bank vs. Moyses (186 U.S., 185; 46 Law Ed., 1118), in discussing the constitutional provision for a national bankrupt act, said.

> "Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: *To what limits is that jurisdiction restricted?* I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its last limit."

Mr. Chief Justice Waite, in the case in re. Deckert, which case was cited and approved in Hanover National Bank vs. Moyses, supra, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

> "But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose.* * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

Under the present Bankrupt Act, as under previous Bankrupt Acts, the trustee takes the property of the bankrupt, (in cases unaffected by fraud) in the same plight and condition that the bankrupt himself

held it. In other words, the trustee occupies no higher position than the bankrupt and his general creditors as of the date the petition was filed, except as to an encumbrance which is void by some positive provision of the act.

Thompson vs. Fairbanks, supra.
In. Re. Garcewich, 115 Fed., 87, and cases there cited.

The property attached in the case at bar was not the property of the bankrupt in any sense of the word, as of the date the petition was filed.

The Act creates no assets, and does not attempt to deal with the rights which may exist between a creditor of a bankrupt and a third party. The relations of the creditor, his right to collect of others, the personal security he may have or acquire, is no concern whatever of the bankrupt's trustee. It is immaterial whether rights which do not affect the bankrupt's estate were created by contract or by the failure of a third party to comply with some statutory requirement.

Swartz vs. Fourth National Bank, 117 Fed., 7.

The District Court and the Circuit Court of Appeals in the case at bar, disregarded the general object and purpose of the Bankruptcy Act, and based their opinions upon a literal gratification of a portion of Sec. 67f, which Section is as follows:

> "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attach-

ment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such coveyance as shall be necessary to carry the purposes of this section into effect."

(30 Stat. at L. 565, Chap. 541, U. S. Comp. Stat. 1901, p. 3418.)

"In the exposition of a statute, the intention of the law-maker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter."

1 Kent's Com. 461.

It is a general rule that the cardinal purpose or intent of the whole Act shall control, and to effectuate that intent a limitation if necessary will be placed on the sense of general terms.

Sutherland on Statutory Construction, p. 318, and the numerous cases there cited.

It is submitted that the above section must be construed with reference to the purposes it was enacted to accomplish; that the purpose of the present act (other than the subject of discharge) is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert the same into money and distribute it among the general creditors without preference.

II

A lien to be void under Section 67f must be, upon property which passes to the trustee of the bankrupt, (under other provisions of the act) *as a part of the bankrupt's estate.*

In Powers Dry Goods Co. vs. Nelson (10 N. D., 580) the Court said:

"Section 67f after declaring that all attach-

ments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien *'to the trustee as a part of the estate of the bankrupt.'* It is entirely plain that this section does not refer to liens upon property which the Court does not undertake to administer and over which it has no jurisdiction. * * * * If defendants's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property, is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; * * * no such absurd construction can be sustained."

In Frazee vs. Nelson (61 N. E. R., p. 40) the Supreme Judicial Court of Massachusetts held:

"The effect of Section 67f of the U. S. Bankruptcy Act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, *so that the property may pass to and be distributed by him among the creditors of the bankrupt.*"

In McKenny vs. Cheney (Vol. II, A. B. R., p. 54) the Supreme Court of Georgia cites with approval the construction given Sec. 67f by the Supreme Courts of Massachusetts and North Dakota. And also cites with approval, the case of Robertson vs. Wilson (15 Kansas, 595). And says:

"In the Kansas case the Court said:

" 'As the Bankrupt Court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property. The lien in that case was that of an attachment levied within four months prior to the adjudication in bankruptcy. It was held that, as the homstead did not pass to the assignee in bank-

ruptcy, the bankruptcy proceedings did not dissolve the attachment.'"

The section in question annuls and revives certain liens on the bankrupt's property; it declares that certain liens against the bankrupt shall be made null and void, and then places thereon this qualification:

> "Unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other liens, shall be preserved for the benefit of the estate."

The power given to the Court of preserving such liens is co-extensive with the destructive operation of the statute. Only a lien which is made void by clause "f" can be preserved by the Court under clause "f." If the lien be not destroyed by operation of the law, then there is no power give the Court to preserve it.

In order, therefore, to determine what liens the Court can preserve, it is necessary to determine what liens are void under the Section. It is submitted that only those liens are void by the operation of clause "f" which are upon the property of the bankrupt which can pass to the trustee. The statute says that all levies, judgments, attachments, or other liens against the bankrupt shall be void; but manifestly it does not mean that when such liens operate upon the property of others than the bankrupt and work no diminuation of the bankrupt's estate, that they shall be void as to such other property. By the very terms of the Section a lien to be void must be upon the property which passes to the bankrupt's trustee. The language of the Section is specific that the property "*shall pass to the trustee as a part of the estate of the bankrupt, unless, etc.*" The conclusion is inevitable that the section makes void only those liens which are upon property which could pass to the trustee of the bankrupt. It is the lien which is invalidated, the active effect of the attachment against the property is what is intended to be destroyed. Now, against what property? Necessarily, against the property owned by the bankrupt as of the date the

petition was filed against him, or such as is covered by Section 70-a, for no other property can pass to the trustee.

I contend that the primary object of this Section was to prevent preferences and facilitate administration. The object of law is to destroy all preferences, and therefore, it destroys liens acquired within the prohibited period, and distributes the assets which belong to the bankrupt, or which his general creditors may subject, but as to those assets in which the general creditors have no interest, the assets of a party, other than the bankrupt, the attachment does not operate, either to prefer the attaching creditor, or to defer the general creditor, and consequently is unaffected by the act. I submit that any other construction would be outside of and a perversion of the objects and purposes of the Bankruptcy Law. It is submitted that the section, when construed as a whole, shows beyond question that the legislative intent was to render void liens upon the property of the bankrupt which could pass to his trustee, and that an attachment upon property which, when levied upon, was not property in which the bankrupt had a beneficial interest, and which, prior to the filing of the petition in bankruptcy, he had neither beneficial interest or legal title, is property which cannot pass to his trustee and consequently does not and cannot come within the operation of the Section, and is not void.

The rights of the trustee in bankruptcy have a composite character. He holds *the estate* of the bankrupt, and the *rights* of the bankrupt's creditors to and in that estate in trust, to apply the one for the purpose of the equalization of the other; he owns what the bankrupt owned at the date of the filing of the petition, and no more; he can do what the general creditors could do at the date of the filing of the petition, and no more. It must necessarily follow that when Section 67f annulled certain liens and provided that "The property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, ***and shall pass to the trustee as a part of the estate of the bankrupt,*** * * * if had ref-

erence solely to property which could pass to the trustee under other provisions of the act.

Sec. 67f was construed by the Supreme Court of Rhode Island, in the case of Doyle vs. Heath, (22 R.I., 213) and was cited and approved by this Court in Metcalf vs. Barker (187 U.S., 165, 47 L. ed., 122), the Court holding that the language "all judgments" was qualified and defined by the context of the act, and was limited to the lien or preference created by such a judgment, and said:

> "Such a construction seems to us to be in exact accord with the spirit and scope of the Act in general, as well as of Sec. 67—that no preference should be created within a specified time of filing the petition in bankruptcy." * * *

The Circuit Court of Appeals of the Fourth Circuit, in the case at bar, (R., p. 28), in discussing said section, used this language:

> "It is contended however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter clause of 67f can have reference only to liens on property, which, if the liens were annulled would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the most obvious meaning of the words. The wording seems clearly to contemplate *that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy,* and it would appear that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee."

The proposition involved in the above quotation, to wit, that a creditor, by reason of his being such, may secure a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. It imposes a penalty upon a creditor of the bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party may have had upon the estate of the bankrupt. It brings into the estate as an asset the proceeds from a lien, not upon that estate, but upon property which no process from any Court, State or Federal, could have reached at the instance of the bankrupt or his creditors, as of the date the petition was filed. It, in effect and in fact, in the case at bar, creates an asset. After a most careful search, we have been unable to find any decision of any Court, holding that the Bankrupt Act avoided a lien on any property whatsoever other than that of the bankrupt which passed to his trustee. It has not heretofore been contended that a Bankrupt Court could take jurisdiction of a creditor of a bankrupt, for the sole reason that he was such. The jurisdiction of the Bankrupt Court, aside from the question of discharge, has heretofore been confined to the administration of the bankrupt's estate which passed to the trustee. It is submitted that this is the limit of the jurisdiction.

A preference within the meaning of the act is the acquisition by a creditor of a greater percentage of the *bankrupt's property*, than other creditors of the same class receive, and the consequent diminution of the bankrupt's estate.

N. Y. Co. National Bank vs. Massie, 192 U.S., 147-48, L. ed. 384.

Swartz vs. Fourth National Bank, 117 Fed. 1. In this case, at page 7, the court said:

"The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out*

of the estate of the bankrupt than that estate will pay on other claims of the same class. It is its effect *upon the equal distribution of the estate of the bankrupt*, not its effect upon the creditor, that determines the preference. * * *

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. It is *the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

It is submitted that in the case at bar the attachment lien was upon property which did not belong to the bankrupt, and, in the language of the lower court, Record, page 19: "*Had valid attachments been not levied, the property would have passed to the trustee of the Roanoke Furnace Company.*" If petitioner's lien be sustained, and it be paid in full, it will not be paid out of the bankrupt's estate.

The distinction between a preferred creditor and petitioner is apparent. A preferred creditor gains an advantage over another creditor in subjecting to the payment of his debts, property which is otherwise liable for the payment of the debts of both parties. But the attached property in the case at bar was not liable *for the debts of any* simple contract creditor of Baird's when the petition was filed. By its attachment petitioner secured a lien on property which, prior to that time, was not liable to the payment of the debt of any simple contract creditor. It did not secure a *preference* on an existing asset; it, in fact, created an asset for the payment of its debts, out of property

which belonged to a third party, and, in the opinion of the Court, property which would have passed and did pass to that party's trustee.

It is respectfully asked that the orders entered subrogating Baird's Trustee to the rights of your petitioner by the District Court, and by the Circuit Court of Appeals be annulled, and that your petition be decreed, the proceeds from its attachment lien.

Respectfully submitted,

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